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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

METIN REZA GUREL,

Defendant and Appellant.

In re METIN REZA GUREL

on Habeas Corpus.

G040566

(Super. Ct. No. 07HF2307)

O P I N I O N

G042139

Appeal from a judgment of the Superior Court of Orange County,
Derek Guy Johnson, Judge. Affirmed. Original proceedings; petition for writ of habeas
corpus after denial of writ by Superior Court of Orange County, Thomas M. Goethals,
Judge. Petition denied. Request for judicial notice. Granted.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant,
Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Metin Reza Gurel appeals from his convictions for rape and forcible oral copulation, contending there was insufficient evidence of the victim's lack of consent to support those convictions. We disagree. There was substantial evidence that defendant committed rape and forcible oral copulation by means of duress, menace, and fear of immediate bodily injury. We therefore affirm the judgment. (Defendant does not challenge his convictions on three counts of making criminal threats, domestic battery, and stalking, conceding the evidence of those crimes was sufficient.)

Defendant also petitions for a writ of habeas corpus. Before and after defendant's trial, the prosecuting attorney was having a sexual relationship with a police officer who investigated this case and testified at trial. Defendant contends the failure to provide this allegedly exculpatory evidence to him constituted a violation under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). We conclude the evidence would not have been material, and defendant has failed to show a reasonable probability it would have changed the outcome of the trial. We deny defendant's petition.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant and Alicia V. began dating in September 2004. In December 2004, defendant told Alicia that during an argument with his ex-wife, he had used a stun gun on her. Defendant and Alicia moved in together in April 2006. While they were living together, defendant threatened Alicia; pulled a knife on her; broke a compact disk, held it to her throat, and threatened to cut her with it; and threatened to

burn her clothing so she could not go to work. Alicia reported defendant's threats to the police in March 2007, and asked him to move out.

After moving out, defendant continued to threaten Alicia by appearing at her gated apartment complex without her permission, and she again reported him to the police in July 2007. Defendant and Alicia continued to date, however, in a regular pattern of defendant insisting they get back together and then breaking up. Defendant and Alicia stopped dating in late September 2007, but continued talking on the telephone. Alicia felt she needed to continue communicating with defendant, because she feared that if she failed to do so, defendant would come to her workplace or apartment. Defendant and Alicia had consensual sex in October 2007.

Defendant continued to tell Alicia "he can do whatever he likes, he has access to [her] apartment, he can get past the security guards at any time." Alicia found her front door lock jammed so it could not be locked, after defendant had asked, "how are you going to get to work if you can't get out your door?" Alicia was unable to access her home computer, which defendant had set up, until he provided her with a password. Alicia believed defendant was able to access her computer because he knew everything she was doing. Alicia was scared and believed defendant's behavior was getting worse, and he was capable of hurting her.

During the week preceding November 10, 2007, defendant and Alicia spoke on the telephone every day. During each conversation, defendant threatened to get her fired from her job or blow up her car, and claimed he had access to her apartment. Alicia was scared.

On November 10, 2007, defendant showed up at the restaurant where Alicia was on a date with another man, used the man's name, grabbed Alicia by the face, and said, "I've got you now, baby" in an angry, hostile manner. Defendant left the restaurant; while standing outside, he looked in at Alicia, and made a slicing gesture across his throat; Alicia was agitated and scared. The restaurant staff escorted defendant

off the premises after he came back inside the restaurant, angry, 15 to 20 minutes later. At the end of Alicia's date, she discovered a cell phone message from defendant, warning her to check her car. When she returned to her car, she discovered one of her tires had been slashed. Alicia was afraid to start her car, given defendant's previous threats to blow it up.

Defendant had also left messages on Alicia's date's cell phone; one of the messages said, "go ahead and fuck her." Alicia's date continued to receive messages from defendant for about one week. The tone of defendant's voice in those messages was threatening. Alicia's date deleted all the other messages from defendant without listening to them.

As Alicia drove home on November 10, defendant called her cell phone 20 times in 20 minutes. After she arrived home, Alicia received another call from defendant, threatening to blow up her car and cause her to lose her job if she failed to arrive at his apartment in 20 minutes. Although she was scared, Alicia went to defendant's apartment to try to reason with him.

When Alicia entered defendant's apartment, she noticed defendant was holding an ASP in his hand. (An ASP is an expandable metal baton carried by peace officers; a civilian must be certified to carry or use one.) Defendant ordered Alicia to sit on a chair; she complied. Defendant began yelling at Alicia, "what should I do to you? What am I going to do to you?" Defendant poked Alicia in the breast with the ASP, causing a bruise. Defendant also held the ASP across Alicia's throat, preventing her from getting off of the chair.

Defendant heated the end of a screwdriver on the stove, and threatened to brand Alicia's face and stick the screwdriver in her vagina to prevent her from having sex with anyone else. Defendant smashed Alicia's cell phone, then held a lit cigarette lighter near her face and threatened to burn her face and hair with it. Defendant continued yelling at and threatening Alicia for 45 minutes to one hour. Alicia did not say anything

during the entire time. She had never seen defendant so angry, and he had never before made such threats. Alicia was very scared, and believed defendant was capable of following through with his threats. Alicia kept trying to figure out a way to get safely out of defendant's apartment.

Defendant then ordered Alicia to get into his bed; she complied because she was afraid he would hurt her. Defendant placed the cigarette lighter and screwdriver on the nightstand. Defendant ordered Alicia to remove her clothes; she replied, "no." Defendant, who had a cast on his arm, touched Alicia's face; when she asked what he was doing, he replied, "when I smash you with my cast I'll know exactly where to hit you on the face so I could ruin your face." Defendant again lit the cigarette lighter, placed it about one inch from Alicia's nose, and said, "what should he do to" Alicia.

Then, in an angry, violent, and demanding voice, defendant ordered Alicia to "suck [his] dick." Alicia said, "no." Defendant repeated what he had said, in a louder and more demanding tone of voice, and pushed Alicia's head toward his penis. Alicia did not believe she had a choice, and was afraid defendant would hurt her if she screamed or resisted, so she orally copulated him. Defendant then engaged in intercourse with Alicia, eventually ejaculating in her mouth. Alicia said "no" a few times, but did not use force against defendant or scream because she was afraid defendant would hurt her. When defendant said he wanted to engage in anal sex, Alicia said no. Defendant did not try to force her to engage in that act.

Alicia did not leave after defendant fell asleep, because he was a light sleeper. When he woke up, defendant demanded that Alicia make his breakfast, which she did. Defendant then told Alicia they would go to her apartment, where she would collect her clothing and give notice on the apartment. He said Alicia would live at his apartment, and he would drive her to and from work so he would "know exactly where [she] was and what [she] was doing the whole time." Alicia convinced defendant to

allow her to return to her apartment on her own to collect her clothing, and she left his apartment.

Alicia stopped at a Verizon store and bought a new cell phone, then drove to the Irvine police station. Alicia reported defendant's threats from the previous evening. She did not report being raped until a police interview about 17 days later; Alicia thought rape could only be committed against a stranger and could not occur if two people were or had been involved in a consensual relationship.

Alicia stayed at her sister's home for several days. Defendant left many angry voicemail messages, threatening Alicia and her family, and stating he would find Alicia even if she changed her phone number, her residence, or her job. After the police arrested defendant, he called Alicia from jail on several occasions and asked her to lie in court.

During a police interview, defendant admitted placing a tracking device on Alicia's car. He also admitted contacting Alicia while she was on a date, but claimed he and Alicia had engaged in consensual sex after she came to his apartment following her date. Defendant also admitted breaking Alicia's cell phone with the ASP, and saying to her before they had sex, "don't fuck up this thing. I will shoot you. I will kill you."

At trial, defendant testified on his own behalf that he and Alicia engaged in consensual sex on November 10-11, 2007. He confirmed accessing Alicia's e-mail to learn about her date on November 10. Defendant testified he found Alicia and her date, but that he left when the date asked him to. Defendant denied making a throat-slashing gesture, claiming he had actually waved his hand as if asking Alicia to come outside and saying "let's talk." Defendant called Alicia from his home, and asked her to come to his apartment; he did not threaten her or demand that she do so. Defendant admitted smashing Alicia's cell phone with the ASP, and telling her to "sit in the fucking chair"; he otherwise denied hitting or threatening Alicia with the ASP. Defendant claimed he suggested they go to bed, and believed Alicia was no longer afraid of him. Defendant

admitted knowing Alicia was scared when they entered the bedroom, and further admitted threatening to shoot her and kill her right before they had sex. He claimed Alicia did not resist or say no to any of his sexual overtures that night, except when she said no to anal sex. Defendant denied threatening Alicia with a lit cigarette lighter.

Defendant testified that he and Alicia agreed the next morning that she would move into his apartment. Defendant admitted calling Alicia from jail after his arrest and urging her to change her testimony.

After a jury trial, defendant was convicted of rape (Pen. Code, § 261, subd. (a)(2)); forcible oral copulation (*id.*, § 288a, subd. (c)(2)); three counts of making criminal threats (*id.*, § 422); domestic battery with corporal injury (*id.*, § 273.5, subd. (a)); and stalking (*id.*, § 646.9, subd. (a)). The jury found true an allegation that one count of making criminal threats was committed with the use of a deadly weapon. (Pen. Code, § 12022, subd. (b)(1).) Defendant was sentenced to the middle term of six years for rape. Concurrent terms were imposed on all the remaining counts. Defendant timely appealed.

On September 25, 2008, the district attorney advised defendant's counsel by letter that the deputy district attorney who prosecuted defendant might have engaged in a sexual relationship with a police investigator who participated in the investigation of this case and testified at defendant's trial. Defendant filed a petition for a writ of habeas corpus with the trial court, which was denied. Defendant then filed a timely petition for a writ of habeas corpus with this court. On our own motion, we consolidated the appeal with the habeas corpus petition for all purposes.¹

¹ The Attorney General filed a request for judicial notice in the habeas corpus case, asking us to take judicial notice of the pleadings, files, and records in *People v. Gurel*, appellate case No. G040566. No opposition was received. We grant the request. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

DISCUSSION

I.

SUFFICIENCY OF THE EVIDENCE

Defendant argues there was insufficient evidence to support his convictions for rape and forcible oral copulation, because there was no evidence Alicia did not consent to engaging in those acts. ““In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if ““upon no hypothesis whatever is there sufficient substantial evidence to support”” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The California Supreme Court has defined the evidence necessary to support a rape conviction: “The gravamen of the crime of forcible rape is a sexual penetration *accomplished against the victim’s will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As reflected in the surveyed case law, in a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker. The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim’s will, can support a forcible rape conviction. [Citation.]” (*People v. Griffin* (2004)

33 Cal.4th 1015, 1027.) The same proof is required to support a conviction for forcible oral copulation: “As with forcible rape, the gravamen of the crime of forcible oral copulation is a sexual act accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As with forcible rape, it is only when one participant in the act uses force to commit the act against the other person’s will that an otherwise lawful act becomes unlawful.”

(*People v. Guido* (2005) 125 Cal.App.4th 566, 576.)

Having reviewed the record, we conclude there was substantial evidence supporting the convictions for rape and forcible oral copulation. Over the course of several years, while they were dating, defendant threatened and terrorized Alicia. Defendant told Alicia he had used a stun gun on his former wife. During the weeks leading up to this incident, defendant threatened Alicia with bodily harm and the loss of her employment. Defendant’s actions of hacking into Alicia’s computer and appearing unannounced inside her gated residential community caused Alicia, reasonably, to assume defendant could reach her physically or otherwise at his whim.

On November 10, 2007, defendant appeared, unannounced and uninvited, while Alicia was on a date, made threatening gestures, left obscene messages on Alicia’s date’s cell phone, and slashed Alicia’s car tire. Defendant then demanded that Alicia come to his apartment, threatening her with physical harm if she failed to do so. When Alicia arrived, defendant smashed Alicia’s cell phone, physically assaulted her with an ASP, and threatened her with a lit cigarette lighter and a heated screwdriver. Alicia said “no” when defendant ordered her to undress, to orally copulate him, and to engage in vaginal sex with him. That Alicia did not continue her objections and did not resist physically because she was in justifiable fear of defendant does not negate her lack of consent.

Even by his own self-serving testimony, defendant admitted smashing Alicia's cell phone, knowing she was afraid when they entered his bedroom, and threatening to shoot and kill her immediately before they had sex.

Here, there was substantial evidence defendant raped Alicia and forced her to orally copulate him "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (Pen. Code, §§ 261, subd. (a)(2), 288a, subd. (c)(2).)

Defendant relies on the following to support his argument: (1) when Alicia objected to anal sex, defendant did not pursue that act; (2) defendant and Alicia's relationship was "dysfunctional," and they had engaged in consensual sex during periods when they were not living together; (3) there was "scant" evidence of Alicia's objection to vaginal or oral sex; and (4) Alicia did not report the rape and forcible oral copulation when she initially went to the police station. That defendant did not sodomize Alicia when she refused to consent does not prove defendant did not rape or force Alicia to orally copulate him. The previous dating relationship between defendant and Alicia does not constitute consent to any sexual activity on the night of November 10-11, 2007. (Pen. Code, § 261.6.) There is substantial evidence of Alicia's objection to vaginal and oral copulation, as detailed *ante*. Alicia's failure to initially report the rape is reasonable, given her misunderstanding that rape could only occur between strangers. On cross-examination, defendant's trial counsel thoroughly explored Alicia's failure to initially report the rape. The jury obviously believed Alicia's explanation.

II.

HABEAS CORPUS

Defendant claims in his petition for a writ of habeas corpus that the failure to disclose the sexual relationship between the deputy district attorney and an investigating officer, who testified on behalf of the prosecution, violated his rights under

Brady, supra, 373 U.S. 83. We apply an independent standard of review. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

“‘[T]he term “*Brady* violation” is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called “*Brady* material”—although, strictly speaking, there is never a real “*Brady* violation” unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.’ [Citation.] Prejudice, in this context, focuses on ‘the materiality of the evidence to the issue of guilt or innocence.’ [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction ‘more likely’ [citation], or that using the suppressed evidence to discredit a witness’s testimony ‘might have changed the outcome of the trial’ [citation]. A defendant instead ‘must show a “reasonable probability of a different result.”’ [Citation.]” (*People v. Salazar, supra*, 35 Cal.4th at pp. 1042-1043.)

For purposes of his answer to defendant’s habeas corpus petition, the Attorney General concedes the first two elements of a *Brady* violation. The only issue remaining is whether the undisclosed evidence was material and would have made a different result reasonably probable.

Defendant argues there is a reasonable probability of a different result, had the evidence of the deputy district attorney’s sexual relationship with the investigating officer – Detective Ricci – been revealed, for two reasons. First, defendant contends that the evidence supporting his convictions for rape and forcible oral copulation was weak. As detailed *ante*, we reject that argument. Second, defendant argues that until Detective

Ricci became involved in the case, Alicia had not made any allegations of rape or forcible oral copulation against defendant. When Alicia first reported the incident to the police on November 11, 2007, she did not mention any sexual activity had occurred between her and defendant the previous night. Alicia also failed to mention this fact when she spoke with Detective Ricci on November 13. On November 15, Alicia told Detective Ricci she and defendant had engaged in sexual activity on November 10-11, but she did not tell him that defendant had raped her or committed forcible oral copulation. On November 28, for the first time, Alicia told Detective Ricci she had had sex with defendant against her will on November 10-11, to prevent defendant from hurting her.

Defendant argues that he could have used the evidence of Detective Ricci's sexual relationship with the deputy district attorney to argue to the jury that Detective Ricci encouraged Alicia to enhance her allegations against defendant to "score points" with the deputy district attorney.

At trial, defendant's counsel explored at length the differences between Alicia's interviews with the police and the fact that not until November 28 did she tell the police that defendant had raped her. The jury rejected the inference suggested by defendant's trial counsel that Alicia fabricated the allegations of rape and forcible oral copulation. Defendant has failed to show a reasonable probability the jury's verdict would have been different if he had presented evidence of the deputy district attorney's sexual relationship with Detective Ricci. In the trial court, Judge Thomas M. Goethals denied defendant's petition for a writ of habeas corpus in a lengthy, detailed order, with which we agree.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.